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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 532

C. D. CALBECK, DEPUTY COMMISSIONER,
BUREAU OF EMPLOYEES' COMPENSATION,
UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

THE TRAVELERS INSURANCE COMPANY AND
LEVINGSTON SHIPBUILDING COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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Respondents, The Travelers Insurance Company and Levingston Shipbuilding Company, sought to enjoin the enforcement of the Deputy Commissioner's award of compensation under the Longshoremen's and Harbor Workers' Act, and the Court of Appeals for the Fifth Circuit reversed the Trial Court's judgment, dismissing the complaint of the Respondents, the opinion being reported in 293 F. 2d 52.

QUESTION PRESENTED

Whether the Texas Workmen's Compensation Act provides the exclusive remedy for an injury sustained by a

Texas employee while performing the work of a welder upon the hull of a barge that was afloat upon navigable waters, but still under construction.

STATUTES INVOLVED

In addition to the Longshoremen's and Harbor Workers' Compensation Act, there is involved the Texas Workmen's Compensation Act, Articles 8306-8309, Vernon's Civil Statutes of the State of Texas. Pertinent parts of the Texas Act are as follows:

Article 8309, Section 1:

"'Employee' shall mean every person in the service of another under any contract of hire, expressed or implied, oral or written, except masters of or seamen on vessels engaged in interstate or foreign commerce. . . .

* * *

"'Association' shall mean the 'Texas Employers' Insurance Association' or other insurance company authorized under this Act to insure the payment of compensation to injured employees or to the beneficiaries of deceased employees.

"'Subscriber' shall mean any employer who has become a member of the association by paying the required premium; provided that the association holds a license issued by the Commissioner of Insurance, as provided for in Section 12, Part 3, of this Act."

Article 8306, Section 2:

"The provisions of this law shall not apply to actions to recover damages for personal injuries nor for death resulting from personal injuries sustained by domestic servants, farm laborers, ranch laborers, nor to employees of any firm, person or corporation having in his or their employ less than three employees, nor to the employes of any person, firm or corporation operat-

ing any steam, electric, street, or interurban railway as a common carrier. ***

Article 8306, Section 3:

"The employes of a subscriber and the parents of minor employes shall have no right of action against their employer or against any agent, servant or employe of said employer for damages for personal injuries, and the representatives and beneficiaries of deceased employes shall have no right of action against such subscribing employer or his agent, servant or employe for damages for injuries resulting in death, but such employes and their representatives and beneficiaries shall look for compensation solely to the association, as the same is hereinafter provided for. * * *"

STATEMENT

In The Travelers Insurance Company case, The Travelers Insurance Company and Levingston Shipbuilding Company filed complaint seeking to enjoin the enforcement of an Award under the Longshoremen's and Harbor Workers' Act in favor of Isabel Scott McGuyer, the widow, and Thomas Dalton McGuyer and Curtis Austin McGuyer, children of Roger D. McGuyer. The defendant, C. D. Calbeck, Deputy Commissioner, filed a motion to dismiss the action because the complaint fails to state a claim upon which relief can be granted (R. 23) and was joined in said motion by the defendants in the court below, Isabel Scott McGuyer, et al (R. 24). The complaint of The Travelers Insurance Company and Levingston Shipbuilding Company was dismissed by the Trial Court (R. 41).

The complaint for the mandatory injunction filed under authority of Article 33 U.S.C., 921, alleges that on and before July 8, 1957 Roger D. McGuyer was employed by plaintiff, Levingston Shipbuilding Company, as a welder, that said employment contract was made within the State of Texas and on July 8, 1957 the said employee, Roger D.

McGuyer, was temporarily working as a welder on the construction of a drilling barge, the hull of which was floating upon navigable waters, to-wit, the Sabine River, at which time he sustained injuries resulting in his death on July 16, 1957 (R. 2); that said drilling barge was being constructed by Levingston Shipbuilding Company and had never been used in navigation and had not been turned over to the owners and was not completed until several months after the accident (R. 3).

The complaint in the Trial Court further alleged that at the time of the accident Levingston Shipbuilding Company had more than three employees and was engaged in work covered by the Texas Workmen's Compensation Act, and that the said employee, Roger D. McGuyer, was covered by the Texas Workmen's Compensation Act, and that the said employer, Levingston Shipbuilding Company, was a subscriber under the terms of said Act, and The Travelers Insurance Company was the insurance carrier under the Texas Act (R. 3).

Further, the complaint alleged that after the death of the employee, Roger D. McGuyer, the defendant, Isabel Scott McGuyer, and the defendants, Thomas Dalton McGuyer and Curtis Austin McGuyer, filed claim for workmen's compensation with the Industrial Accident Board of the State of Texas, claiming the death benefits provided by said Act, and that thereafter the said defendants filed claim with the Deputy Commissioner under the Longshoremen's and Harbor Workers' Act (R. 3).

One formal hearing before the Deputy Commissioner, under the Longshoremen's and Harbor Workers' Act, was held Friday, June 13, 1958, which resulted in the Compensation Order dated February 18, 1959, rejecting the claim (R. 14-17). The Order of February 18, 1959, rejecting the claim was for the following reason:

> "It has not been held that the work on an uncompleted vessel comes within the provisions of the Longshoremen's and Harbor Workers' Compensation Act." (R. 16)

Thereafter, a second Compensation Order was entered July 30, 1959, modifying the original Order only to the extent of finding that the accidental injury occurred within the boundaries of Calcasieu Parish, Louisiana (R. 18-19). This second Order, in referring to the grounds for the rejection of claim contained in the original Order of February 18, 1959, said, "In the said Compensation Order the claimants' claim for compensation was rejected for the reason that it has not been held that the work on an uncompleted vessel comes within the provisions of the Longshoremen's and Harbor Workers' Act * * * " (R. 18).

Thereafter suit was filed to set aside the Deputy Commissioner's Compensation Orders of February 18, 1959 and July 30, 1959, and the defendant, C. D. Calbeck, in the court below answered by requesting the Court to remand same in order for him to make further findings and conclusions and this resulted in the Order of May 13, 1960 awarding benefits under the Longshoremen's and Harbor Workers' Act to the McGuyers (R. 10-13). This latter Order found that the employer and insurance carrier had paid $153.37 compensation benefits under the Texas Workmen's Compensation Act (R. 12).

In the formal hearing before the Deputy Commissioner in The Travelers Insurance Company case, Mr. Cecil Beeson, Personnel Manager of Levingston Shipbuilding Company stated that he is in charge of handling the claims for injuries received at his employer's place of business; had been there for fifteen years prior to the accident made the basis of the claim; had always reported injuries on new construction to the Industrial Accident Board of the State of Texas; and that they had never refused to take jurisdiction of such injuries (R. 36).

SUMMARY OF ARGUMENT

The employee in The Travelers Insurance Company case received his injury while working as a welder in the construction of a new drilling barge, the hull of which was floating upon navigable waters. There is no question but what the Texas Workmen's Compensation Act, Articles 8306-8309, Vernon's Civil Statutes covered the employer and the employee and the Travelers Insurance Company was liable under th xas Act. *The Travelers Insurance Company* v. *Gonzalez*, 351 S.W. 2d 374 (Civ. App. 1961, writ of error refused). The Texas Act provides that it is the exclusive remedy and this Court has long ago given effect to the exclusive remedy provision of the Texas Act, even to injuries occurring upon navigable waters: *Millers' Indemnity Underwriters* v. *Braud*, 270 U.S. 59 (1926).

The Longshoremen's and Harbor Workers' Act, in Section 903(a), specifically allows coverage "only * * * if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law." Until the present cases before the Court there has been no question but what new construction was compensable under the State Act[a], and an opinion of September 2, 1927 of the United States Employees' Compensation Commission specifically recognized that employees in new construction were not under the Act.[b] After over thirty years during which the employers, employees, insurance carriers, and their attorneys had considered new construction under the state acts, the question has now been raised in the instant cases that the Congressional intent in 1927 was to cover new construction.

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[a] See letter of Mr. William McCauley, Director, Bureau of Employees' Compensation, Petitioners' Brief, Appendix, p. 86.

[b] See Opinion No. 7, Petitioners' Brief, Pages 83-84.

The legal history preceding the Longshoremen's and Harbor Workers' Compensation Act of 1927 shows that the intent of Congress was to fill the gap left by *Southern Pacific Company* v. *Jensen*, 244 U.S. 205 (1917), and to provide the modern form of compensation for injuries and death involving maritime workers that could not validly be provided for by the states. *Jensen* specifically held that there was a constitutional barrier to the application of any state workmen's compensation act to an injury occurring upon navigable waters because it would work material prejudice to the characteristic features of the general maritime law.

Congress immediately passed the Act of October 6, 1917 attempting "to save to claimants the rights and remedies under the workmen's compensation law of any state", but this attempt on the part of Congress was declared unconstitutional in *Knickerbocker Ice Company* v. *Stewart*, 253 U.S. 149 (1920). Thereafter *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U.S. 469 (1922) held that new ship construction was a matter of only local concern and that the Oregon workmen's compensation law could apply. Congress apparently agreed with *Grant Smith-Porter Ship Company*, but intended to apply the decision to all cases with the Act of June 10, 1922, adding to the savings clause a provision saving to claimants other than masters or members of the crew, their rights and remedies under the workmen's compensation law of any state, and providing that said rights and remedies should be exclusive. Again this attempt by Congress was held invalid in *Washington* v. *W. C. Dawson & Co.*, 264 U.S. 219 (1924). Thereafter additional cases by this Court attempted to draw the line between *Jensen* and *Grant Smith-Porter Ship Company*, some allowing the state act to apply and some holding the state act could not apply.

Congress was thus forced into the passage of the Long-

shoremen's and Harbor Workers' Act and certainly was aware of the existing decisions of this Court, particularly that of *Grant Smith-Porter Ship Company*. Certainly the legal history shows the Congressional intent in Section 903(a) to exclude work on new construction from the coverage of the Longshoremen's and Harbor Workers' Act.

Since the passage of the Act, all of the decisions of this Court have recognized the limitation of the coverage of Section 903(a). In the early case of *Crowell* v. *Benson*, 285 U.S. 22 (1932) the Court said, "In limiting the application of the Act to cases where recovery 'through workmen's compensation proceedings may not validly be provided by state law,' the Congress evidently had in view the decisions of this Court with respect to the scope of the exclusive authority of the national legislature."[5] The Court then cited the *Grant Smith-Porter* line of cases as illustrating the intent of Congress to allow certain injuries to remain under the state law.

Parker v. *Motor Boat Sales, Inc.*, 314 U.S. 244, allowed recovery under the Longshoremen's and Harbor Workers' Act, but specifically recognized that Section 903 (a) contained a subtraction from the scope of the act and held that the subtraction was not large enough to take the case before the Court outside of the coverage. There was no pre-1927 decision holding that the employee and the accident in the *Motor Boat* case could be compensated under the state law.

Davis v. *Department of Labor*, 317 U.S. 249 reversed a state court that had refused to allow state workmen's compensation. The case involved facts that in the pre-1927 decisions had neither been held to be exclusively maritime or exclusively within the state acts, and *Davis* pointed out that in this twilight zone coverage would be allowed under the state acts, for otherwise the state act must be held

[5] 285 U.S. 39, 40.

unconstitutional. *Davis* specifically held that there was a limit to the Longshoremen's and Harbor Workers' coverage as shown by the legal history preceding the act.[4]

In the case of *Pennsylvania Railroad Co.* v. *O'Rourke*, 344 U.S. 334, the Court had to decide between the Federal Employers' Liability Act and the Longshoremen's and Harbor Workers' Act because of the exclusive remedy provisions of Section 905 of the latter act. The Court again recognized that Section 903(a) contained a limitation on the jurisdiction of the Federal Act, but before holding that the Longshoremen's and Harbor Workers' Act was applicable, specifically held that the *Jensen* line of demarcation between state and federal jurisdiction had been accepted and that "New Jersey could not have enacted statutes granting compensation for respondent's injury on navigable water, therefore respondent comes within the coverage of that portion of Section 903(a) that includes those outside the reach of state compensation laws." 344 U.S. 337

The last pronouncement by this Court is contained in *Hahn* v. *Ross Island Sand & Gravel Company*, 358 U.S. 272 (1959) and the Court again recognized the limitation contained in the coverage provisions of Section 903(a) where it is said:

> "By its terms, the Longshoremen's and Harbor Workers' Compensation Act does not apply 'if recovery

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[4] 317 U.S. 252-253:

> "* * * March 4, 1927, came the Federal Longshoremen's and Harbor Workers' Act, 33 U.S.C. §901 et seq., 33 U.S.C.A. §901 et seq. *Here again, however, Congress made clear its purpose to permit state compensation protection whenever possible* by making the federal law applicable only 'if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.'" (Emphasis ours)

for the disability or death through workmen's compensation proceedings *may* *** *validly be provided by State Law*;" 3, 44 Stat. 1426, 33 U.S.C. 903(a), 33 U.S.C.A. 903(a), (emphasis supplied) ***."

The only Court of Appeals decision involving the exact point of the instant cases before the Court is that of *United States Casualty Company* v. *Taylor*, 64 F. 2d 521, (4 Cir. 1933; certiorari denied, 290 U.S. 639). That case involved services being rendered in the completion of a new ship launched but not quite finished or placed in navigation, and the specific holding of the Court was that the same was not covered by the Longshoremen's and Harbor Workers' Act since it involved injuries and death for which workmen's compensation might validly be provided by state law and was excluded by Section 903(a), and that the limitation imposed by Section 903(a) barred the Deputy Commissioner from awarding compensation under the Longshoremen's and Harbor Workers' Act.

In summary, it is the position of Respondents that the present case before the Court, involving new construction, unquestionably falls under the Texas Workmen's Compensation Act. The remaining question as to whether it falls under the Longshoremen's and Harbor Workers' Act is clearly answered in the negative by the pre-1927 and post-1927 decisions of this Court in addition to the decision of *U. S. Casualty Co.* v. *Taylor* and the Opinion of September 2, 1927 by the United States Employees' Compensation Commission. As said by Circuit Judge Brown "*** until these two cases there was no serious contention that new construction work was covered"[2], and as said by Deputy Commissioner Calbeck in his first Compensation Order dated February 18, 1959, denying recovery in the present

[2] 293 F. 2d 54

case, "It has not been held that the work on an uncompleted vessel comes within the provisions of the Longshoremen's and Harbor Workers' Compensation Act." (R. 16)

ARGUMENT

I. The Texas Workmen's Compensation Act Covers New Ship Construction and Provides That It Is the Exclusive Remedy.

The primary obligation of the state to care for its own employees was recognized by the State of Texas in the Texas Workmen's Compensation Act of 1913 (Acts 1913, 33rd Leg., Ch. 179, p. 429, Art. 8306, et seq., Vernon's Revised Civil Statutes, 1925). The Texas Act defines "employee" within the meaning of the Act to "mean every person in the service of another under any contract of hire, express or implied, oral or written, except masters of or seamen on vessels engaged in interstate or foreign commerce, * * *" Art. 8309, §1.[1]

The only employees or employers excluded by the Act are "domestic servants, farm laborers, ranch laborers, * * * employees of any firm, person or corporation having in his or their employ less than three employees, * * * employees of any person, firm or corporation operating any steam, electric, street or interburban railway as a common carrier", Art. 8306, §2.[2]

In the present *Travelers Insurance Company* case, Roger D. McGuyer was working for Levingston Shipbuilding Company as a welder in the construction of a new drilling barge, the hull of which was floating upon navigable waters, to-wit, the Sabine River. McGuyer was an employee within the meaning of Art. 8309, §1. The Travelers Insurance

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[1] This brief, supra, p. 2.

[2] This brief, supra, p. 2.

Company was the association[3] and Levingston Shipbuilding Company was a subscriber.[4]

The decisions of the Texas courts, both before and after the Longshoremen's and Harbor Workers' Act have held that injuries such as those received by the employee, Roger D. McGuyer, in the instant case, occurring upon navigable waters were covered by the Texas Workmen's Compensation Act. *Emmons* v. *Pacific Indemnity Company*, 208 S.W. 2d 884 (Tex. S. Ct. 1948); *Millers' Indemnity Underwriters* v. *Boudreaux*, 261 S.W. 137, Tex. Comm. App. 1924, aff'd., 46 S. Ct. 194, 270 U.S. 59 (1926); *Brown* v. *Aetna Casualty & Surety Company*, 145 S.W. 2d 171 (Tex. Comm. App. 1940, opinion adopted by S. Ct.); *Travelers Insurance Co.* v. *Gonzalez*, 351 S.W. 2d 374 (Civ. App. 1961, writ of error refused, n.r.e.); and *Indemnity Insurance Company of North America* v. *Marshall*, 308 S.W. 2d 174 (Beaumont Civ. App. 1957, w. o. ref., n.r.e.). The case of *Travelers Insurance Co.* v. *Gonzalez* involved an injury while the employee was working as a painter and sandblaster on a new and incompleted drilling barge floating in the Sabine River.

The Texas Act provides that "such employees and their representatives and beneficiaries shall look for compensation solely to the association, as the same is herein provided for."[5]

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[3] "'Association' shall mean the 'Texas Employers' Insurance Association' or other insurance company authorized under this Act to insure the payment of compensation to injured employees or to the beneficiaries of deceased employees." Article 8309, Section 1, this brief, page 2.

[4] "'Subscriber' shall mean any employer who has become a member of the association by paying the required premium; provided that the association holds a license issued by the Commissioner of Insurance, as provided for in Section 12, Part 3, of this Act." Article 8309, Section 1, this brief, page 2.

[5] Article 8306, Section 3, this brief, supra, page 3.

The exclusive remedy feature of the Texas Workmen's Compensation Act as set forth in Article 8306, §3 of that Act was held to be effective and to prescribe the only remedy for an injury occurring upon the Sabine River in *Millers' Indemnity Underwriters* v. *Braud*, 270 U.S. 59 (1926). In that case this Court said with reference to the Texas Act:

> "* * * The Act prescribes the only remedy; its exclusive features abrogate the right to resort to the admiralty court which otherwise would exist." 270 U.S. 65

The claimants in the instant case recognize the applicability of the Texas Workmen's Compensation Act and the exclusive feature provisions of said act and thus have filed a claim under the Texas Act with the Industrial Accident Board of the State of Texas where the same is now pending (R. 3).

II. Section 903(a) of the Longshoremen's and Harbor Workers' Compensation Act Excludes New Ship Construction from Its Coverage.

The Longshoremen's and Harbor Workers' Compensation Act contains a specific limitation on its coverage in Section 903(a) where coverage is provided as follows:

> "Compensation shall be payable under this Chapter in respect of disability or death of an employee, *but only* if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and *if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State Law.* * * * "[6] (emphasis ours)

It is the position of Respondents that the above limitation

[6] 33 U.S.C.A §903(a)

to coverage to cases where "recovery for the disability or death through workmen's compensation proceedings may not validly be compensated by state law" excludes new ship construction because at the time of the passage of the Longshoremen's and Harbor Workers' Act in 1927, Congress was fully aware of the decision of this Court allowing state acts to apply to new ship construction. *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U.S. 469 (1920). The legal history preceding the passage of the Longshoremen's and Harbor Workers' Act clearly shows this Congressional intent.

It is the further position of Respondents that the decisions of this Court since 1927 have construed the intent of Congress to exclude new construction as in *Grant Smith-Porter Ship Co.* from the coverage of the Longshoremen's and Harbor Workers' Act. The pre-1927 legal history and the post-1927 decisions of this Court leave no other construction of Section 903(a) possible.

A. The Legal History Before the Longshoremen's and Harbor Workers' Compensation Act of 1927

The pertinent history begins with the "ill-starred decision"[7] of *Southern Pacific Company* v. *Jensen*, 244 U.S. 205 (1917). In that case death benefits under the New York workmen's compensation law had been awarded by the New York Court where the employee was killed while unloading a vessel afloat on navigable waters. This Court, in a five to four decision, reversed the State Court judgment holding that to apply the New York law to an accident occurring on navigable waters while unloading a vessel would be invalid as it conflicts with the Constitution. The majority opinion pointed out that Article III, Section 2 of the Constitution ex-

[7] Concurring opinion of Mr. Justice Frankfurter in *Davis* v. *Department of Labor*, 317 U.S. 255, 259.

tends the judicial power of the United States to all cases of admiralty and maritime jurisdiction, and Article I, Section 8, confers upon Congress the power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and that by Section 9 of the Judicial Act of 1789 the District Courts of the United States were given exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it. The Court then held that state legislation contravening the essential purpose expressed by an Act of Congress or working material prejudice to the characteristic features of the general maritime law or interfering with the proper harmony and uniformity of that law in its international and interstate relations would not be valid and that the work of a stevedore was maritime in its nature, his employment was a maritime contract, and the injuries received were maritime, and thus, to apply the New York workmen's compensation law to compensate for these maritime injuries would conflict with the Constitution and be invalid.

After the *Jensen* case the Act of October 6, 1917 added to the savings clause "so as to save to claimants the rights and remedies under the workmen's compensation law of any state." In *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149 (1920), another five to four decision, this Court reversed an award of death benefits under the New York workmen's compensation act. The majority opinion held that the power of Congress to legislate concerning the rights and liabilities within the maritime jurisdiction and remedies for their enforcement arises from the Constitution, and while Congress could pass its own workmen's compensation act for maritime injuries, it could not delegate to the state as this would defeat the purpose and destroy the harmony and uniformity which the Constitution established in the maritime

field. The opinion pointed out that in *The Hamilton*, 207 U. S. 398, in an admiralty proceeding, effect was given as against a ship registered in Delaware to a statute of that state which permitted recovery by an ordinary action for fatal injuries, and that in that case the power of a state to supplement the maritime law to that extent was recognized, but the Court refused to extend the doctrine of *The Hamilton*.

After the *Knickerbocker* case, in *The Francis McDonald*, 254 U. S. 242 (1920) this Court held that a libel in admiralty could not be maintained for a debt under a contract to furnish materials, work and labor for the completion of a vessel that had been launched. The unanimous opinion by Mr. Justice McReynolds said:

> "Notwithstanding possible and once not inappropriate criticism, the doctrine is now firmly established that *contracts to construct entirely new ships are nonmaritime* because not nearly enough related to any rights and duties pertaining to commerce and navigation. It is said that in no proper sense can they be regarded as directly and immediately connected with navigation or commerce by water. * * * *And we think the same reasons which exclude such contracts from admiralty jurisdiction likewise apply to agreements made after the hull is in the water*, for the work and material necessary to consummate a partial construction and bring the vessel into condition to function as intended." 254 U. S. 244-245. (Emphasis ours.)

Prior to *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469 (1922), this Court decided the case of *Western Fuel Co.* v. *Garcia*, 257 U. S. 233 (1921). The *Western Fuel Company* case involved a libel in admiralty for the death of an employee killed upon navigable waters while employed as a stevedore. The action was based upon negligence and it was contended that effect should be given to the California

statute requiring a negligence action to be brought within one year. This Court in a unanimous decision delivered by Mr. Justice McReynolds reversed the District Court decision, awarding substantial damages, with instructions to dismiss the libel, holding that the District Court should have applied the limitation period of the California law.

The case of *Grant Smith-Porter Ship Company* v. *Rohde*, 257 U.S. 469 involved a libel in admiralty for injuries to an employee which were received while he was working as a carpenter on a partially completed vessel lying upon a navigable stream. The vessel had been launched but had not been completed, although it had been substantially completed at the time of the injury. The employee at the time of the injury was at work constructing a bulkhead enclosing certain tanks in the vessel. The action was based upon negligence and the defense was that the Oregon workmen's compensation law barred recovery. The Circuit Court of Appeals certified questions to this Court as follows:

> "(1) Is there jurisdiction in admiralty because the alleged tort occurred on navigable waters?
>
> "(2) Is libellant entitled because of his injury to proceed in admiralty against respondent for the damages suffered?"
>
> 257 U.S. 475.

This Court, without dissent, in an opinion by Mr. Justice McReynolds held that construing the first question as to inquire whether general admiralty jurisdiction extends to recover damages resulting from a tort committed on a vessel in the process of construction when lying on navigable waters, the answer is "yes", and further, assuming that the second question presents the inquiry as to whether "the exclusive features of the Oregon Workmen's Compensation Act would apply and abrogate the right to re-

cover damages in an admiralty court, which would otherwise exist,'" the answer is "Yes". The opinion of this Court specifically held that the contract for constructing the vessel was non-maritime and neither the libellant's general employment nor his activities at the time had any direct relation to navigation or commerce, citing *The Francis McDonald*, 254 U.S. 242. The Court distinguished *Jensen* and recognized and applied the local concern doctrine of *Western Fuel Co.*, stating:

> "In Western Fuel Co. v. Garcia we recently pointed out that as to certain local matters regulation of which would work no material prejudice to the general maritime law, the rules of the latter might be modified or supplemented by state statutes. The present case is controlled by that principle. The statute of the state applies and defines the rights and liabilities of the parties. The employee may assert his claim against the Industrial Accident Fund to which both he and the employer have contributed as provided by the statute, but he cannot recover damages in an admiralty court." (257, U.S. 477)

After the decision in *Grant Smith-Porter Ship Co.* v. *Rohde*, there were several cases decided by this Court prior to the passage of the Longshoremen's and Harbor Workers' Act, some of which followed *Jensen* in holding the state act inapplicable as working material prejudice to the characteristic features of the general maritime law and others which followed *Grant Smith-Porter Ship Company* v. *Rohde* and *Western Fuel Company* v. *Garcia*, recognizing that the state could supplement the general maritime law under the "local concern" doctrine.

In *State Industrial Commission* v. *Nordenholt Corporation*, 259 U.S. 263 (1922), a New York court had reversed

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*257 U.S. 478

an award of workmen's compensation for death benefits under the New York act. The employee died from accidental injuries received while working as a longshoreman unloading a vessel lying on navigable waters, but at the time of his injury he was working on the dock. This Court reversed the New York court, holding that the injury occurring on the dock was an injury occurring upon an extension of land and that the application of the New York workmen's compensation act would not conflict with any superior maritime law, citing and quoting from *Grant Smith-Porter Ship Co. v. Rohde*.

Great Lakes Dredge & Dock Co. v. Kierejewski, 261 U.S. 479 (1923) involved a libel in admiralty brought for the death of an employee against his employer based on negligence. The employer was engaged in dredging, piledriving, etc. and had a yard at Buffalo, New York. The employee was a boilermaker, employed to perform services as called upon. At the time of the accident, he was making repairs on a scow moored in the navigable waters of the Buffalo River, and was on a scaffold resting upon a float alongside the vessel. This Court held that admiralty had jurisdiction because the employee was performing a maritime service to a complete vessel afloat on navigable waters. It distinguished *Grant Smith-Porter Ship Company* on the grounds that the latter did not involve general employment or activities that had any direct relation to navigation or commerce.

In *Washington v. W. C. Dawson & Co.*, 264 U.S. 219 (1924), the Court "overruled" the second expression of Congressional intent to make applicable the state workmen's compensation laws. Congress had passed the Act of June 10, 1922[9] amending the Judicial Code so as to save

[9] 42 Stat. 634

"to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel their rights and remedies under the Workmen's Compensation Law of any state, district, territory, or possession of the United States, which rights and remedies when conferred by such law shall be exclusive." This Court, in an opinion by Mr. Justice McReynolds, reluctantly agreed to by Mr. Justice Holmes, and with Mr. Justice Brandeis writing a dissenting opinion, held the attempted amendment was beyond the power of Congress in that the exception of master and crew was insufficient to meet the objections pointed out in *Knickerbocker Ice Company* v. *Stewart*, 253 U.S. 149.

Robins Dry Dock & Repair Co. v. *Dahl*, 266 U.S. 449 (1925) involved a case where the plaintiff had recovered a judgment in a New York state court for damages for personal injuries on the basis of negligence of his employer. At the time of his injury he was working on a vessel lying in navigable waters and working on a scaffold. The Trial Court instructed the jury on a New York statute requiring an employer to furnish a safe scaffold. The opinion of this Court held that the instruction to the jury to consider the provisions of the local law in deciding whether or not the employer was negligent would not have been permissible in an admiralty court and it was no less objectionable when given in a state court because the tort was maritime, suffered by one doing repair work on board a completed vessel and the matter was, therefore, not of mere local concern as in *Grant Smith-Porter Ship Company*, but had direct relation to navigation and commerce, as in *Great Lakes Dredge & Dock Co.* v. *Kierejewski*.

Great Lakes Dredge & Dock Co. v. *Kierejewski*, was followed again in *Gonsalves* v. *Morse Dry Dock & Repair Co.*, 266 U.S. 171 (1924). This case involved a libel action

brought against the employer. The employee, at the time of the injury, was engaged in the repair of a vessel in a dry dock. This Court held that the libel action should not have been dismissed since repairs to a vessel while in an ordinary dry dock were not made on land, citing *The R. W. Parsons*, 191 U.S. 17, and *The Jefferson*, 215 U.S. 130.

In 1926 this Court in an unanimous decision affirmed an award of workmen's compensation under the Texas workmen's compensation act for the death of an employee occurring upon the navigable waters of the Sabine River, *Millers' Indemnity Underwriters* v. *Braud*, 270 U.S. 59 (1926). In this case, the employee had submerged himself from a floating barge anchored in the navigable Sabine River thirty-five feet from the bank for the purpose of sawing off the timbers of an abandoned set of ways once used for launching ships and which had become an obstruction to navigation. While thus submerged the air supply failed and he died of suffocation. The Supreme Court of Texas awarded workmen's compensation under the Texas law, 261 S.W. 137. It was contended before this Court that the claim arose out of a maritime tort and that the rights and obligations of the parties were fixed by the maritime law and that the State had no power to change these by statute or otherwise. In a unanimous decision delivered by Mr. Justice McReynolds, this Court cited and quoted from *Grant Smith-Porter Ship Co.* v. *Rohde* to the effect that the State law would govern where "regulation of rights, obligations and consequent liabilities of the parties as between themselves by local rule would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations", 270 U.S. 64. The opinion specifically recognized that the facts were sufficient to show a maritime tort and admiralty jurisdiction would

extend to same except for the exclusive features of the Texas workmen's compensation act. The Court stated:

> "In the cause now under consideration the record discloses facts sufficient to show a maritime tort to which the general admiralty jurisdiction would extend save for the provisions of the state Compensation Act; but the matter is of mere local concern and its regulation by the state will work no material prejudice to any characteristic feature of the general maritime law. *The act prescribes the only remedy; its exclusive features abrogate the right to resort to the admiralty court which otherwise would exist.*" (270 U.S. 64-65) (emphasis ours)

Alaska Packers Ass'n v. *Industrial Accident Commission of California*, 276 U.S. 467 (1928) involved a claim to recover workmen's compensation benefits under the California workmen's compensation law, and an award of workmen's compensation was affirmed by this Court. The employee was employed by his employer to go to Alaska as a seaman on a vessel to work as a fisherman, make nets, fix small boats, work in the cannery, and do anything else he was told to do. At the time of his injury, he was attempting to push a small 26 foot boat into the water. This Court held that there probably was some question as to whether this was within admiralty jurisdiction, but even if it were within admiralty jurisdiction, it fell within the "local concern" doctrine, in that at the time of his injury he was not engaged in any work so directly connected with navigation and commerce that to permit the rights of the parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law, citing *Grant Smith-Porter Ship Co.* v. *Rohde* and *Millers' Indemnity Underwriters* v. *Braud*.

The logging and timber industry was held to be an industry of local concern in *Sultan Railway & Timber Company* v. *Dept. of Labor and Industries*, 277 U.S. 135 (1928).

This case involved two suits to restrain the enforcement of orders requiring the employers to pay into the State Workmen's Compensation Fund of the State of Washington, and their dismissal was affirmed by this Court. In one case, the employer was engaged in logging operations, and the employees involved were those that would put logs into booms after they had been thrown into a navigable river so that they could be towed elsewhere. The other employer was engaged in sawmill work and the employees involved would take the booms apart and guide the logs up a conveyor into the mill. This Court held that these occupations were governed by the local law and not the maritime law on the basis of *Great Smith-Porter Ship Co., Millers' Indemnity Corporation* and *Alaska Packers Ass'n* cases.

An award of state workmen's compensation by the Supreme Court of the State of Wisconsin was reversed by this Court in a stevedore's case in *Northern Coal & Dock Company v. Strand*, 278 U.S. 142 (1928). The basis of that decision was that the employee, at the time of his injury, was doing longshore or stevedore work aboard a vessel lying on navigable waters, and that such an undertaking was not a matter of purely local concern, but had direct relation to commerce and navigation, and thus, the State Act could not apply, as in *Great Smith-Porter Ship Company* or *Millers' Indemnity Underwriters*.

Again in 1929 the State Supreme Court decision awarding death benefits under the state workmen's compensation law was reversed in *London Guarantee & Accident Company v. Industrial Accident Commission of California*, 279 U.S. 109 (1929). The employee in this case was engaged as a navigator for a pleasure deep sea fishing company. At the time of his death, he and two other employees were on an 18 foot vessel in a storm attempting to recover one of the fishing boats that had broken from its mooring. This Court, after reviewing all of the cases since *Southern Pacific Co. v. Jen-*

seaman, held that he was a seaman in the course of his employment and the vessel he was engaged to navigate was registered and had all the features of maritime employment, and that, therefore, the state Compensation Act could not apply because it would be prejudicial to the characteristic features of the general maritime law.

John Baizley Iron Works v. *Spun*, 281 U.S. 222 (1930) and *Employers' Liability Assurance Corporation, Ltd.* v. *Cook*, 281 U.S. 233 (1930) were two other cases decided after passage of the Longshoremen's and Harbor Workers' Act, but each involved an injury that occurred prior to the passage of that Act. In the *John Baizley Iron Works* case the employee had recovered workmen's compensation under the Pennsylvania Act for an injury received in 1926 when he was engaged in performing repairs on a vessel floating upon navigable waters. This Court reversed the award of state workmen's compensation and held that repairing a completed ship lying in navigable waters has direct and intimate connection with navigation and commerce and was not the same as in *Grant Smith-Porter Ship Co.* v. *Rohde*, but fell under the cases of *Great Lakes Dredge & Dock Co.* v. *Kierejewski*, *Gonsalves* v. *Morse Dry Dock & Repair Co.* and *Robins Dry Dock & Repair Co.* v. *Dahl*. It is to be noted that Mr. Justice Stone wrote a dissenting opinion, joined by Mr. Justice Holmes and Mr. Justice Brandeis on the basis that the award of state compensation should be affirmed on the authority of *Rosengrant* v. *Harvard*, 273 U.S. 664, which affirmed, without opinion, but on the authority of *Grant Smith-Porter Ship Co.* v. *Rohde* and *Millers' Indemnity Co.* v. *Braud*, the judgment of the Alabama Supreme Court allowing workmen's compensation for an injury to an employee who was working as a lumber inspector for a

lumber manufacturer and was on board a schooner lying in navigable waters temporarily for the purpose of checking a cargo of lumber that was then being discharged from a barge nearby.

Again in *Employers' Liability Assurance Corporation, Ltd., v. Cook*, 281 U.S. 233, an award of Texas workmen's compensation was reversed by this Court in an opinion by Mr. Justice McReynolds. The employee was employed by Ford Motor Company to do any kind of work and as a part of his contract he was on board a vessel lying on navigable waters, unloading cargo at the time of his injury. It is to be noted that again Mr. Justice Stone wrote a dissenting opinion, concurred in by Mr. Justice Holmes and Mr. Justice Brandeis, stating that the State Act could not apply where the employee was a seaman within the meaning of the Jones Act and thus in a field that Congress had occupied, but stating that the facts of the case were not so exclusively controlled by the maritime law that workmen otherwise in the situation of the claimant who were not seamen and, therefore, not given the remedy of the Jones Act could be excluded from the benefits of a compensation act like that of Texas. It is of particular interest to note what the dissenting opinion said with reference to the Longshoremen's and Harbor Workers' Act:

> "The present case arose before the effective date of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 424 (33 U.S.C.A. §§901-950). But the remedies given by that Act are withheld where recovery may be had under local compensation acts and not all persons engaged in unloading a vessel are entitled to recover under it, even though without remedy under local compensation laws. See §3(a), 33 U.S.C.A. §903(a)." (280 U.S. 237-238)

B. The Pre-1927 Legal History Shows the Intent of Congress in §903(a) to Exclude New Ship Construction

From the foregoing legal history, it is obvious that the purpose of the Longshoremen's and Harbor Workers' Act of 1927 was to fill the gap left by the *Jensen* line of decisions and to provide the modern form of compensation for injuries and death involving maritime workers that this Court had held could not validly be provided for by the several States. It is likewise clear that at the time of the passage of the Longshoremen's and Harbor Workers' Act, Congress was fully aware of at least the then line of demarcation as set forth by the *Grant Smith-Porter Ship Company* line of decisions, and fully aware of this Court's decision that the exclusive features of the Texas Workmen's Compensation Act abrogated other causes of action where the Act could be constitutionally applied as held in *Millers' Indemnity Co.* v. *Braud*, 270 U.S. 59. With these precise decisions before them, it must follow that the intent of Congress in limiting the coverage of the Longshoremen's and Harbor Workers' Act in Section 903 (a) was to exclude new ship construction from the coverage.

The foregoing history also shows that immediately after the decision in the *Jensen* case, Congress passed the Act of October 6, 1917, adding to the savings clause "so as to save to claimants the rights and remedies under the workmen's compensation law of any state". This was struck down in the five to four decision of *Knickerbocker Ice Company* v. *Stewart*, 253 U.S. 149. The legal history further shows the intent of Congress in the Act of June 10, 1922 to leave to the states the compensating of persons other than masters or members of the crew and that the state acts should be exclusive remedy. The Act of June 10, 1922 was struck down by *State of Washington* v. *W. C. Dawson & Co.*, 264 U.S. 219 (1924).

The intent of Congress to allow the State Workmen's compensation law to apply to longshoremen and harbor workers and for the same to be the exclusive remedy is clearly evidenced by the Act of October 6, 1917 and the Act of June 10, 1922. It is further noted that the lead cases against the application of the state compensation law to such workers were five to four decisions, *Southern Pacific Company* v. *Jensen*, and *Knickerbocker Ice Co.* v. *Stewart*, while the decisions of this Court in favor of the application of the state workmen's compensation law were unanimous decisions, *Grant Smith-Porter Ship Co.* v. *Rohde*, *Millers' Indemnity Underwriters* v. *Brand*.

Respondents respectfully urge that this pre-1927 legal history clearly indicates the intention of Congress at the time of the passage of the Longshoremen's and Harbor Workers' Act to leave everything constitutionally possible to the state workmen's compensation laws rather than as contended by Petitioner to make the Federal law applicable in every case that Congress had the power to do so.

C. The Legal History After the Longshoremen's and Harbor Workers' Act of 1927.

Since the passage of the Longshoremen's and Harbor Workers' Act in 1927, and up to some time shortly before the third award in *The Travelers Insurance Company* case, it had never been considered that injuries on new construction were within the Longshoremen's and Harbor Workers' Act (see letter of Mr. William McCauley, Director of Bureau of Employees' Compensation, Petitioner's Brief, appendix, page 86). Shortly after the effective date of the Act, the United States Employees' Compensation Commission (predecessor to the present [illegible] Bureau of Employees' Compensation [illegible]) having the duty to enforce the Act, issued Opinion No. 7 dated September 2, 1927. That opinion expressly cited *The Francis McDonald*,

254 U.S. 242, *Robins Dry Dock & Repair Co.* v. *Dahl*, 266 U.S. 449, and *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U.S. 469, and concluded as follows:

> "The United States Employees' Compensation Commission therefore will take no action under the longshoremen's act against an employer engaged only in the construction of vessels who does not comply with the act, nor against any employer engaged in the construction and repair of vessels who secures payment of compensation to employees while employed on repair work on a vessel in a dry dock or on marine ways."[10]

That it was the intent of Congress to allow the state laws to apply under the decisions prior to the Act is clear from the preceding discussion of the pre-1927 legal history. In addition, however, we can look to the decisions of this Court after the passage of the Longshoremen's and Harbor Workers' Act to confirm that Congress did so intend when placing the limitation of coverage in Section 905(a).

In *Employers' Liability Assurance Corporation, Ltd.* v. *Cook*, 281 U.S. 233, State compensation was not allowed by this Court to an injury occurring on navigable waters while engaged in unloading a vessel. The injury occurred before the effective date of the Longshoremen's Act, but the intention of Congress in the limitation provisions of Section 903(a) were commented upon in the dissenting opinion by Mr. Justice Stone, wherein it is said, "but the remedies given by the Act are withheld where recovery may be had under local compensation acts * * *. See Section 3(a), 33 U.S.C.A. §903(a)." 281 U.S. 237, 238.

In *Noqueira* v. *New York, N. H. & H. R. Co.*, 281 U.S. 128 (1930), the Court had before it the question as to

[10] U.S. Employees' Compensation Commission Opinion No. 7, September 2, 1927, Petitioners' Brief, Appendix, p. 84.

whether the Federal Employers' Liability Act, 45 U.S.C.A., §§51-59, or the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927 was applicable to injuries to a railroad employee received while upon navigable waters. In an unanimous opinion delivered by Mr. Chief Justice Hughes, this Court held that since the employee was engaged in loading a carfloat on navigable waters, his injury was within the terms and provisions of the Longshoremen's and Harbor Workers' Act, and since it fell under Section 903(a), that the exclusive provisions of Section 905 excluded the application of the Federal Employers' Liability Act. The opinion discusses the history of the act and specifically recognizes the limitation provision of Section 903(a) when the Court said, "The application of the Act in such cases was explicitly made to depend upon the question whether the injury occurred upon navigable waters and recovery therefor could not validly be provided by a state compensation statute."[11]

The next comment upon the intention of Congress in placing the limitation provision on Section 903(a) is found in *Crowell* v. *Benson*, 285 U.S. 22 (1932). In that case the Court had before it the question of the extent of judicial review from a finding by the Deputy Commissioner, but in reviewing the history of the Act and its jurisdictional limitations, the Court specifically recognized the exclusion by Congress of cases where the states might validly provide compensation. In the opinion it was said, "In limiting the application of the Act to cases where recovery 'through

[11] 281 U.S. 128 at p. 136. See also p. 131 where the Court said:

"The general scheme of the Longshoremen's and Harbor Workers' Compensation Act was to provide compensation to employees engaged in maritime employment, except as stated, for disability or death resulting from injury occurring upon the navigable waters of the United States where recovery through workmen's compensation proceedings might not validly be provided by state law. * * *"

workmen's compensation proceedings may not validly be provided by state law," the Congress evidently had in view the decisions of this Court with respect to the scope of the exclusive authority of the national legislature." 285 U.S. 39-40. The citations following the above quotation from the Opinion were to the *Jensen* line of cases and the *Grant Smith-Porter Ship Company* line of cases.

The next opinion of this Court commenting upon the limitation provision contained in Section 903(a) was in 1941 in *Parker* v. *Motor Boat Sales, Inc.*, 314 U.S. 244. That case involved an action by the employer to enjoin an award made under the Longshoremen's and Harbor Workers' Act. The employer was engaged in selling small boats, maritime supplies, and outboard motors. At the time of the accident made the basis of the claim, the employee was on a boat trip to test one of the outboard motors. While there was some question as to whether he was authorized to go on the boat, it was shown that he was instructed to go with a superior fellow-employee to help place the outboard motor on the boat, and that at this time he had no specific instructions to stay out of the boat and that his superior fellow-employee acquiesced in his remaining on the boat to keep a lookout for hidden objects. The Circuit Court had held that the Longshoremen's and Harbor Workers' Act did not apply because the employee's work was so local in character that the State of Virginia could validly have provided workmen's compensation. The holding was primarily based on the fact that the employee was hired as a janitor and porter and was predominantly a non-maritime employee. This Court, however, held that habitual performance of other and different duties on land would have no effect on the maritime activity at the time of the accident because Section 902, subdivision 4 expressly provided for

the Act's application to "employees (who) are employed * * * in whole or in part upon the navigable waters of the United States." However, the opinion expressly recognized that if the Circuit Court's opinion was to be sustained, it would be on the basis that this particular case fell within the area of the limitation set out in Section 903(a) as being a case where recovery may validly be provided by state law. After referring to *Jensen*, *Knickerbocker* and *Washington* v. *Dawson*, the opinion pointed out that the problem did not involve the constitutional principles announced in those cases since there was no question but that Congress could constitutionally have provided compensation, but that the question was "whether Congress has so provided in this statute."[12] The opinion expressly recognized that Section 903(a) was a subtraction from the scope of the Act, but held that "it is not a large enough subtraction to place this case outside the coverage which Congress intended to provide".[13] The decision in the *Parker* case again recognized all prior interpretations of the Longshoremen's and Harbor Workers' Act which was that the purpose of the Act was to provide for Federal compensation in the area where specific decisions previously had held the state Acts could not apply[14] and recognized that the limitation provision of Section 903(a) was to be interpreted in the light of the pre-1927 decisions without regard to whether the constitutional

[12] 314 U.S. 248

[13] 314 U.S. 249

[14] "There can be no doubt that the purpose of the Act was to provide for federal compensation in the area which the specific decisions referred to placed beyond the reach of the states." 314 U.S. 249.

principles announced in those cases were affirmed or rejected.[15]

It is to be noted that in *Parker* v. *Motor Boat*, the employee's activities at the time of the accident were not such as could be classified under any specific pre-1927 holding as of local concern; in other words, there was no pre-1927 decision of this Court holding under such facts that the states could validly provide workmen's compensation. On the other hand, there was no specific fact situation in the pre-1927 decisions that would clearly make the employee in the case fall under the *Jensen* line of decisions. It could thus be said that *Parker* v. *Motor Boat* created a twilight zone for the application of the Longshoremen's and Harbor Workers' Act in cases where there was no pre-1927 decision which Congress could have intended to exclude at the time of the passage of the Act which contained the limitation of Section 903(a).

While *Parker* v. *Motor Boat* may be considered an application of the "twilight zone" where there are no pre-1927 precedents, the first reference and actual holding of a "twilight zone" was in applying state coverage in *Davis* v. *Department of Labor*, 317 U.S. 249 (1942). In that case the Supreme Court of Washington had held that the state workmen's compensation act could not provide benefits consistently with the Federal Constitution. This Court reversed

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[15] "The main impetus for the Longshoremen's and Harbor Workers' Compensation Act was the need to correct a gap made plain by decisions of this Court. We believe that there is only one interpretation of the proviso in Section 3(a) which would accord with the aim of Congress; the field in which a state may not validly provide for compensation must be taken, for the purposes of the Act, as the same field which the Jensen line of decision excluded from state compensation laws. Without affirming or rejecting the constitutional implications of those cases, we accept them as the measure by which Congress intended to mark the scope of the Act they brought into existence." 314 U.S. 250.

that decision. The employee was a structural steel worker and was drowned in a navigable stream while his employer was performing a job to dismantle an abandoned drawbridge which spanned the river. The steel was cut from the bridge and lowered from a barge by derrick and when loaded, the barge was to be towed by tug to a storage point about two hundred and fifty feet away. Three vessels had been brought to the job site, a tug, derrick barge, and a barge, all licensed vessels. The deceased had helped to cut some of the steel from the bridge and at the time of the accident was working on the barge which had not yet been completely loaded. His duty appeared to have been to examine the steel after it was lowered to the barge and when necessary, to cut the pieces to proper lengths. He fell, or was knocked into the stream and was drowned. It was clear from the terms of the Washington compensation statutes that the deceased was specifically covered. In the opinion of the Court, delivered by Mr. Justice Black, the effect of the *Jenson* line of decisions was recognized to interfere with the application of the state compensation laws to all maritime employees, but under some circumstances to allow the state laws to apply to maritime employees. In interpreting Section 903(a), the opinion again reviewed the pertinent history. It was pointed out that after the *Jenson* decision refused to allow state laws to apply, Congress passed the Act of October 6, 1917,[16] attempting to give to injured maritime employees the rights and remedies under state workmen's compensation laws, but that this Act was held unconstitutional by *Knickerbocker Ice Co.* The opinion then pointed out the attempt of Congress after the *Knickerbocker* case to allow the state acts to apply and to be an exclusive remedy in the Act of June 10, 1922,[17] but the latter Act was

[16] 40 Stat. 395
[17] 42 Stat. 634

held invalid by *State of Washington* v. *W. C. Dawson & Co.* The opinion then followed:

> "* * * March 4, 1927, came the Federal Longshoremen's and Harbor Workers' Act, 33 U.S.C. §901 et seq., 33 U.S.C.A. §901 et seq. *Here again, however, Congress made clear its purpose to permit state compensation protection whenever possible* by making the federal law applicable only 'if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.'" (317 U.S. 252-253; emphasis ours)

After recognizing the intent of Congress to cover maritime workers only if the state laws could not be validly applied, this Court held that "employees such as decedent here occupy that shadowy area within which at some undefined and undefinable point state laws can validly provide compensation",[18] and recognizing that the Court had "been unable to give any guiding, definite rule to determine the extent of state power,"[19] the Court held that in such marginal cases or twilight zone cases, without overruling *Jensen*, it should be held "that the Constitution is no obstacle to the petitioner's recovery."[20] Mr. Justice Frankfurter and Mr. Chief Justice Stone, in concurring opinions, apparently did not favor the implications of recover under both the federal and the state act.

Following *Davis* came the per curiam decisions of this Court permitting state workmen's compensation to apply to repair work on navigable waters. *Bethlehem Steel Company* v. *Moores*, 335 U.S. 874, affirming 323 Mass. 162, 80 N.E. 2d 478; and *Baskin* v. *Industrial Accident Commission*, 338 U.S. 854, vacating the judgment in 89 Cal. App. 2d 632, 201 P. 2d 549. In *Moores* case this Court affirmed the state court's judgment awarding compensation under the Mas-

[18] 317 U.S. 253
[19] 317 U.S. 253
[20] 317 U.S. 258

sachusetts act, citing *Davis*. In *Baskin*, this Court reversed the State court's denial of state compensation to allow the California court to reconsider its interpretation of *Davis* in light of the affirmance of *Moores* case. These two cases are a clear recognition of the applicability of the state workmen's compensation in light of the twilight zone theory and the presumptions in favor of the constitutionality of the state statutes as stated in *Davis*.

The next decision by this Court interpreting the Longshoremen's and Harbor Workers' Act did not have the problem of state versus federal conflict. This was the decision in *Pennsylvania Railroad Company* v. *O'Rourke*, 344 U.S. 334 (1953). In that case the railroad employee had sought recovery under the Federal Employers' Liability Act and the defense was that the Longshoremen's and Harbor Workers' Act provided an exclusive remedy by the terms of Section 905. The employee's work in that case was that of a railroad brakeman, but at the time of the injury made the basis of his suit he had to climb aboard car floats on navigable waters to release the hand-brakes so that the cars could be pulled off of the float by the engine. In this case the Court again specifically recognized and accepted the *Jensen* line of demarcation between state and federal jurisdiction,[21] and found that the claimant's employment at the time of his accident was maritime, the same as in *Nogueira*.[22]

In holding the Act applicable to employers that had any employees engaged in maritime employment, the Court was interpreting the exclusive remedy provisions of Section 905 and not the coverage provisions of Section 903(a) for the

[21] "The 'Jensen line of demarcation between state and federal jurisdiction' has been accepted." 344 U.S. 337.

[22] "* * * Whether the injury occurred to an employee loading freight into cars on the float, as in the Nogueira case, or to one like respondent moving loaded cars from a float could make no difference. Both employments are maritime. * * *" 344 U.S. 339-340.

Court had already held the injury was within Section 903(a) when the opinion stated:

> "New Jersey could not have enacted statutes granting compensation for respondent's injury on navigable water, therefore respondent comes within the coverage of that portion of Section 903(a) that includes those outside the reach of state compensation laws." 344 U.S. 337.

The next decision of this Court was a per curiam decision in *Avondale Marine Ways* v. *Henderson*, 346 U.S. 366 (1953). In the *Avondale* case, the Fifth Circuit (201 F. 2d 437) had before it an attempt to set aside an award under the Longshoremen's Act. At the time of the accident, the employee was cleaning a tank of a barge[23] that had been drawn up on a marine railway. There was no contention that the work the employee was doing was not maritime; the only contention was that a marine railway (on which the vessel is drawn out of the water) was not "any dry dock" as provided in Section 903(a) of the Longshoremen's Act.[24] The Fifth Circuit allowed recovery under the Longshoremen's Act and this Court affirmed that decision in a per curiam opinion citing *Davis*, *Baskin* and *Moores*. The concurring opinions by Mr. Justice Burton and Mr. Justice Douglas simply recognize the soundness of the holding below that a marine railway is "any dry dock" within the meaning of the Act. The affirmance by the majority of this Court in

[23] 346 U.S. at page 366:

> "• • • • in that the decedent, at the time of receiving his fatal injury, was engaged in cleaning a tank of a barge • • • "

[24] *Avondale Marine Ways, Inc.* v. *Henderson*, 201 F. 2d 437, at page 438:

> "• • • In short, its position was that the language, 'navigable waters of the United States, including any dry dock,' as those words are used in Section 3(a) of the Act, 33 U.S.C.A. §903(a) does not extend to and include the marine railway."

a per curiam opinion, citing *Davis*, *Moores* and *Baskin* recognizes that *Davis* is authority for applying the twilight zone theory to the locale of the accident as well as to the maritime character of the work.

In connection with *Avondale*, it is noted that there was no pre-1927 decision holding that work on a dry dock was within the realm of the local concern doctrine, but to the contrary *Gonsalves* v. *Morse Dry Dock & Repair Co.*, 266 U.S. 171 (1924) held that work on a floating dry dock was exclusively maritime, relying upon *The R. W. Parsons*, 191 U.S. 17, 33; and *The Jefferson*, 215 U.S. 130 (1909). In *The Jefferson* it was said:

> "It was long ago recognized by this Court that a service rendered in making repairs to a ship or vessel, whether in or out of the water, was a maritime service. Peyroux v. Howard, 7 Pet. 324, 8 L. Ed. 700."

Thus the decisions in the majority per curiam opinion, and the concurring opinions, were supported by the pre-1927 decisions.

The last pronouncement interpreting Section 903(a) is found in *Hahn* v. *Rock Island Sand & Gravel Company*, 358 U.S. 272 (1959). In the *Hahn* case, the Court permitted recovery under the common law of the State of Oregon on the basis that the employee's injury occurred within the twilight zone and he could elect to recover under the workmen's compensation law of the state and since the employer had no workmen's compensation under the state act, he could maintain a negligence action, but again in that decision, the Court recognized the limitations of coverage under the Longshoremen's and Harbor Workers' Act:

> "By its terms, the Longshoremen's and Harbor Workers' Compensation Act does not apply 'if recovery for the disability or death through workmen's compensation proceedings *may* • • • *validly be provided by State*

Law." (3, 44 Stat. 1426, 33 U.S.C. 903(a), 33 U.S.C.A. 903(a), emphasis supplied) * * *"

D. The Post-1927 Decisions of this Court Place New Ship Construction Outside of the Scope of the Longshoremen's and Harbor Workers' Compensation Act.

The foregoing post-1927 legal history shows that the intent of Congress in Section 903(a) has been repeatedly construed to be to exclude injuries occurring upon navigable waters where recovery for the disability or death through workmen's compensation proceedings may be validly compensated by state laws. The opinions in *Nogueira*, *Crowell* v. *Benson*, *Parker* v. *Motor Boat*, *Davis*, *O'Rourke* and *Hahn* specifically state that the coverage provisions of Section 903(a) includes only cases where recovery through workmen's compensation proceedings cannot validly be provided by state law. The per curiam opinions in the remaining cases of *Moores*, *Baskin* and *Arendale* contain no discussion. It follows that the decisions of this Court since 1927 have recognized that state workmen's compensation applies to new construction as in *Great South-Porter Ship Co.* v. *Rohde*, and that the state remedy is exclusive, as in *Millers' Indemnity Underwriters* v. *Braud*, the same as if these decisions had been written into Section 903(a). The fact that the Court has expanded the pre-1927 state coverage in the twilight zone cases of *Davis*, *Moores*, and *Baskin*, has no effect on the present case. In those decisions, the Court has found no constitutional obstacle in applying the state law.[3] This was the view of the respectable minority in the pre-1927 five to four decisions of *Jensen* and *Knickerbocker*. The view of *Davis*, *Moores* and *Baskin* is the same as the view Congress had

[3] *Davis* said: "* * * we hold that the Constitution is no obstacle to the petitioners' recovery." 317 U.S. 258.

in the passage of the Act of October 6, 1917 wherein Congress attempted to "overrule" *Jensen* and make state compensation applicable to all cases. Likewise, the view of *Davis, Moores* and *Baskin* is the same as the view of Congress in the Act of June 10, 1922 when Congress attempted to "overrule" *Knickerbocker* and not only make state compensation applicable to all cases, but provide that the state remedy was exclusive.

The Court created the "twilight zone" in *Davis* apparently because the Court recognized that the problem of allowing state compensation in cases where there are no specific pre-1927 holdings allowing state coverage involves the meeting or avoiding the constitutional principles announced by *Jensen*.

In the instant case before the Court there is no such problem for two reasons. The first reason is that the unanimous decision of this Court in *Grant Smith-Porter Ship Co.* v. *Rohde* has taken new construction out of the *Jensen* line of decisions and *Millers' Indemnity Underwriters* v. *Braud* has made the state remedy exclusive. In the second place, the question of whether the Longshoremen's and Harbor Workers' Act is applicable involves no question of constitutional objection, but only a matter of the construction of Section 903(a). The question here present is not whether Congress could but whether Congress did.

Respondents respectfully submit that the pre-1927 legal history, including *Grant Smith-Porter Ship Company*, leaves no doubt but that it was the clear intent of Congress to exclude new ship construction from the Longshoremen's and Harbor Workers' Act and to leave new ship construction under the state acts. Further, it is respectfully submitted that every decision of this Court since 1927 has so construed the coverage provisions of Section 903(a).

If we should adopt the theory of coverage contended for by Petitioners, that *O'Rourke* took away the requirement of a maritime service at the time of the accident and that *Avondale* took away the requirement that the accident occur upon navigable waters, then what accident is not under the Longshoremen's and Harbor Workers' Act? The dilemma and litigation that would face employers and their carriers under such a holding would be endless, particularly in view of the holding in *Hahn*.

E. The Decisions of the Courts of Appeals Hold That New Ship Construction Is Not Within the Coverage of the Longshoremen's and Harbor Workers' Compensation Act.

Petitioners contend that decisions of other Courts of Appeals have allowed awards under the Longshoremen's and Harbor Workers' Act under circumstances inconsistent with the decision below of the Court of Appeals for the Fifth Circuit. None of the cases cited by Petitioners except *U. S. Casualty Company* v. *Taylor*[26] involved injuries under circumstnces which pre-1927 decisions of this Court had previously held to be under the coverage of state workmen's compensation acts. For instance, *The Travelers Insurance Company* v. *McManigal* (4 Cir., 139 F. 2d 949) involved an injury occurring while the employee was working on the construction of a dry dock from which the water had been pumped out at the time of the accident. In *Newport News Shipbuilding & Dry Dock Co.* v. *O'Hearne* (4 Cir., 192 F. 2d 268), the injury was received while repairing a dry dock that was in another dry dock for repairs. *Morrison-Knudsen Co.* v. *O'Leary* (9 Cir., 288 F. 2d 542, cert. denied, 368 U.S. 817) involved the drowning of a worker who was using a boat on the waters of a tunnel which tunnel had been used to divert the waters of a navigable stream. In *Dixie Sand & Gravel Corp.* v. *Holland*, (6 Cir., 255 F. 2d 304) the employee

[26] 64 F. 2d 521, certiorari denied, 290 U.S. 639

at the time of the injury was working with and acting as a night watchman making the rounds of the employer's barges when he fell between the barges into the river and drowned. In *DeBardeleben Coal Corp.* v. *Henderson* (5 Cir., 142 F. 2d 481) the deceased was employed by a barge transport company to keep up the floating equipment including painting and repairing the barges and he fell off a barge into the Mississippi River.

To the contrary, *U. S. Casualty Company* v. *Taylor* involved a case exactly like the present case before this Court. In that case the employee was engaged in performing services in the completion of a new ship launched but not quite finished or placed in navigation, and the Fourth Circuit Court reversed an award under the Longshoremen's and Harbor Workers' Act because the injury was received under circumstances where workmen's compensation may be validly provided by state law and held that the limitation imposed by Section 903(a) barred an award by the Deputy Commissioner.[27]

Petitioner contends that in *The Travelers Insurance Co.* v. *McManigal*, 139 F. 2d 949 the Fourth Circuit refused to follow its decision in *U. S. Casualty Company* v. *Taylor*,

[27] We conclude from these pronouncements of the Supreme Court that the federal act is applicable only to workmen engaged in maritime employment, and that compensation under the act may lawfully be paid only in those cases in which a state has no authority to act. The phrase 'may not validly be provided by State law' obviously refers to the authority of a state to act and not to the inquiry as to whether a state has exercised its power. Congress intended to occupy only a portion of the field (the crews of ships being excepted) from which the states are excluded, and to abstain altogether from duplicating the work of the states in the field which they are permitted to enter. * * *" 64 F. 2d 524.

* * *

"It follows that the deputy commissioner was barred from awarding compensation in this case by the limitation imposed by section 903(a) of the act." 64 F. 2d 525.

but this is not so, for the decision specifically recognized the maritime distinction between building a new ship and repairing a completed vessel[28] but held this distinction was not analagous to the construction of a dry dock.[29] The decision in *McManigal* clearly recognized that an injury may be excluded by that portion of Section 903(a) of the Act wherein it is provided "* * * but only * * * if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law * * *" but held that such provision was not applicable to the facts of the case.[30]

Petitioner further contends that the *Taylor* decision was further rejected by the Fourth Circuit in *Newport News Shipbuilding & Dry Dock Co.* v. *O'Hearne*. It is to be noted that the *O'Hearne* case involved an injury received while repairing a dry dock that was in another dry dock for repairs. This was just as much a maritime service as the repair of a vessel. Rather than rejecting the *Taylor* decision, the *O'Hearne* decision again recognized the cov-

[28] The Opinion states at 139 F. 2d 950: "* * * An analogy is drawn with the historic distinction which the courts have made between work performed in the building of a ship which is not considered maritime and work upon a completed ship which partakes of this character. See *Frankel* v. *Bethlehem-Fairfield Ship Yard*, 4 Cir., 132 F. 2d 634; *United States Casualty Co.* v. *Taylor*, 4 Cir., 64 F. 2d 521."

[29] 139 F. 249 at page 952: "It is not material that in the pending case the dry dock was not finished. Not only was the locality within the maritime jurisdiction, but the work was maritime in its nature. We do not think that a distinction should be drawn in this respect between an unfinished and a finished structure in analogy to the distinction between a completed ship and one in the course of construction. * * *"

[30] The Court said in 193 F. 2d 949, at pages 952-953: This discussion disposes of the argument that the whole matter was one of local concern within the jurisdiction of the State Commission and therefore excluded from the jurisdiction of the federal commission by the exception in §3 of the Act. * * *"

erage limitation contained in Section 903(a) of the Act and said:

> "* * * we hold that the case falls within the purview of the Federal statute and *outside the permissible scope of the state enactment.*" (emphasis ours) 192 F. 2d 968, 971.

CONCLUSION

For the foregoing reasons Respondents, The Travelers Insurance Company and Levingston Shipbuilding Company, respectfully submit that the judgment of the Court of Appeals below reversing the District Court and setting aside the Compensation Order of May 13, 1960 be in all things affirmed.

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